IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MATTHEW SCHAUB, on behalf of himself and similarly situated employees,	:	2:16-cv-00756-MAK
Plaintiff,	:	
v.	:	
CHESAPEAKE & DELAWARE BREWING HOLDINGS, LLC and IRON HILL BREWERY, LLC,	:	
Defendants.	:	

MEMORRANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR APPROVAL OF THE CLASS/COLLECTIVE ACTION SETTLEMENT AND RELATED RELIEF

Date: November 1, 2016

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TABLE OF CONTENTS

I. THE LEGAL CLAIMS AND LITIGATION RISKS....................1

A. Plaintiff challenges Defendants' former tip-pooling practices....................1

B. Plaintiff and the class face significant litigation risks....................3

II. MEDIATION AND SETTLEMENT....................5

A. The parties engage in discovery....................5

B. Settlement is reached at mediation with Judge Welsh....................5

C. The settlement terms....................6

1. The class is defined to include servers and bartenders....................6

2. Defendants create a non-reversionary $1,290,000 settlement fund....................7

3. Defendants have discontinued the challenged Expediter tip-out policy....................7

4. The release is limited, and only claimants waive FLSA rights....................7

III. PRELIMINARY APPROVAL, THE NOTICE/CLAIM PROCESS, AND THE ANTICIPATED SETTLEMENT PAYOUTS....................8

A. The Court preliminarily approves the settlement....................8

B. The Court-approved notice process yields excellent results....................9

C. The class members will share $938,000....................10

IV. ARGUMENT....................11

A. The notice and claim process, as implemented by the administrator warrant approval....................11

B. The Court should certify the Rule 23 settlement class....................13

C. The Court should certify the FLSA settlement collective....................16

D. The Settlement should be approved as fair, reasonable, and adequate....................18

1. The settlement is entitled to a presumption of fairness....................18

2. The Girsh, Prudential, and Baby Products factors favor approval 19

E. The requested service award warrants approval..24

F. The requested attorney's fees of $305,688 warrant approval...................................25

1. The preferred "percentage of the fund" method favors approval 25

2. The Gunter/Prudential factors favor approval 26

3. The lodestar crosscheck favors approval 28

G. The requested litigation costs of $31,312 warrant approval....................................29

V. CONCLUSION...29

TABLE OF AUTHORITIES

CASES

Adams v. Bayview Asset Management, LLC
11 F. Supp. 3d. 474 (E.D. Pa. 2014) 18

Amchem Products, Inc. v. Windsor
521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) 16

American Pipe and Construction Co. v. State of Utah
414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)....................6

Baby Neal v. Casey
43 F.3d 48 (3d Cir. 1994)....................13, 14

Bourne v. Ansara Restaurant Group, Inc.
2016 U.S. Dist. LEXIS 14399 (E.D. Mich. Aug. 26, 2016)....................22

Calarco v. Healthcare Services Group, Inc.
2015 U.S. Dist. LEXIS 46950 (M.D. Pa. Apr. 7, 2015)....................18

Cerutti v. Frito Lay, Inc.
777 F. Supp. 2d 920 (W.D. Pa. 2011)....................6

Cheeks v. Freeport Pancake House, Inc.
796 F.3d 199 (2d Cir. 2015)....................18

Chung v. The New Silver Palace Restaurant, Inc.
246 F. Supp. 2d 220 (S.D.N.Y. 2002)....................5

Chung v. Wyndham Vacation Resorts, Inc.
2015 U.S. Dist. LEXIS 77176 (M.D. Pa. June 15, 2015) 29

Craig v. Rite Aid Corp.
2013 U.S. Dist. LEXIS 2658 (M.D. Pa. Jan. 7, 2013) 22, 24, 28

Creed v. Benco Dental Supply Co.
2013 U.S. Dist. LEXIS 132911 (M.D. Pa. Sept. 17, 2013) 25, 27-28

DeSilva v. North Shore-Long Island Jewish Health Sytem, Inc.
27 F. Supp. 3d 313 (E.D.N.Y. 2014)....................17

Dugan v. Towers
2013 U.S. Dist. LEXIS 136305 (E.D. Pa. Sept. 24, 2013) 12

Ford v. Lehigh Valley Restaurant Group, Inc.
2014 U.S. Dist. LEXIS 92801 (M.D. Pa. July 9, 2014)....2, 3

Ford v. Lehigh Valley Restaurant Group, Inc.
2016 U.S. Dist. LEXIS 31732 (M.D. Pa. Mar. 10, 2016)....18, 22, 25

Frank v. Eastman Kodak Co.
228 F.R.D. 174 (W.D.N.Y. 2005) 24

Girsh v. New America Fund, Inc.
521 F.2d 153 (3d Cir. 1975)....19

Goldman v. RadioShack Corp.
2006 U.S. Dist. LEXIS 2433 (E.D. Pa. Jan. 23, 2006)....17

Gunter v. Ridgewood Energy Corp.
223 F.3d 190 (3d Cir. 2000)....26

Haught v. Summit Resources, LLC
2016 U.S. Dist. LEXIS 45054 (M.D. Pa. April 4, 2016)....22, 24

In re: AT&T Corp. Securities Litig.
455 F.3d 160 (3d Cir. 2006)....26

In re Baby Products Antitrust Litig.
708 F.3d 173 (3d Cir. 2013)....19, 20, 24

In re: Cendant Corp. Litig.
264 F.3d 201 (3d Cir. 2001)....19, 21

In re Chickie's & Pete's Wage & Hour Litig.
2014 U.S. Dist. LEXIS 30366 (E.D. Pa. Mar. 7, 2014)....18

In re Diet Drugs
2000 U.S. Dist. LEXIS 12275 (E.D. Pa. Aug. 28, 2000)....23

In re: General Motors Pick-Up Truck Fuel Tank Products Liability Litig.
55 F.3d 768 (3d Cir. 1995)....18, 21, 26

In re Lucent Technologies, Inc.
327 F. Supp. 2d 426 (D.N.J. 2004) 27

In re NFL Players Concussion Injury Litig.
821 F.3d 410 (3d Cir. 2016).... 13, 14, 19-20

In re Pet Food Products Liability Litig
629 F.3d 333 (3d Cir. 2010) 20

In re: Prudential Insurance Co. America Sales Practice Litig.
148 F.3d 283 (3d Cir. 1998)...14, 15, 20, 26, 29

In re Rite Aid Corp. Securities Litig.
396 F.3d 294 (3d Cir. 2005).. 25-26, 28, 29

In re Warfarin Sodium Antitrust Litig.
391 F.3d 516 (3d Cir. 2004).. 21-22

Iwaskow v. JLJJ, Inc.
2016 U.S. Dist. LEXIS 136676 (M.D. Pa. Sept. 28, 2016) 18

Keller v. TD Bank, N.A.
2014 U.S. Dist. LEXIS 155889 (E.D. Pa. Nov. 4, 2014)..29

Kraus v. PA Fit II, LLC
155 F. Supp. 3d 516 (E.D. Pa. 2016) 18

Lazy Oil v. Witco Corp.
95 F. Supp. 2d 290 (W.D. Pa. 1997)...22

Mabry v. Hildebrandt
2015 U.S. Dist. LEXIS 112137 (E.D. Pa. Aug. 24, 2015) 26, 27

Marcus v. BMW of North America, LLC
687 F.3d 583 (3d Cir. 2012) 13

McLaughlin v. Richland Shoe Co.
486 U.S. 128, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988)..4

Montano v. Montrose Restaurant Associates, Inc.
800 F.3d 186, 193 (5th Cir. 2015) 2

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.
259 F.3d 154 (3d Cir. 2001)..14

Pacheco v. Vantage Foods, Inc.
2016 U.S. Dist. LEXIS 16709 (M.D. Pa. Feb. 11, 2016) 18, 29

Pedigo v. Austin Rumba, Inc.
722 F. Supp. 2d 714 (N.D. Tx. 2010) 3, 5

Reyes v. Netdeposit, LLC
802 F.3d 469 (3d Cir. 2015)..13

Ripley v. Sunoco, Inc.
287 F.R.D. 300 (E.D. Pa. 2012)..28

Rodriguez v. National City Bank
726 F.3d 372 (3d Cir. 2013)...13, 14

Rougvie v. Ascena Retail Group, Inc.
2016 U.S. Dist. LEXIS 99235 (E.D. Pa. July 29, 2016)...13

Rouse v. Comcast Corp.
2015 U.S. Dist. LEXIS 49347 (E.D. Pa. Apr. 15, 2015).....................................17, 18, 29

Sullivan v. DB Investments, Inc.
667 F.3d 273 (3d Cir. 2011) 16, 24

Taveres v. S-L Distribution Co., Inc.
2016 U.S. Dist. LEXIS 57689 (M.D. Pa. May 2, 2016) 24-25, 29

Taylor v. Pittsburgh Mercy Health System, Inc.
2009 U.S. Dist. LEXIS 40080 (W.D. Pa. May 11, 2009)..6

Tyson Foods, Inc. v. Bouaphakeo
__ U.S. __, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016) 15

Vasco v. Power Home Remodeling Group LLC
2016 U.S. Dist. LEXIS 141044 (E.D. Pa. Oct. 12, 2016)...13

Wal-Mart Stores, Inc. v. Dukes
131 S. Ct. 2541 (2011)...13

Weiss v. York Hospital
745 F.2d 786 (3d Cir. 1984) 14

Zavala v. Wal Mart Stores, Inc.
691 F.3d 527 (3d Cir. 2012)...16, 17

STATUTES, RULES, AND MISCELLANEOUS

29 U.S.C. §§ 201, *et seq*...4, 8

Fed. R. Civ. P. 23... Passim

43 P.S. §§ 333.101, *et seq*...6

43 P.S. § 260.1, *et seq.* 8

N.J.S.A. §§ 34:11-56a, *et seq.* 8

N.J.S.A. §§ 34.11-4.1, *et seq.* 8

19 Del. Code Ann. §§ 901, *et seq.* 8

19 Del. Code Ann. §§ 1101, *et seq.* 8

U.S. Dept. of Labor Wage & Hour Opinion Letter No. WH-489
1978 DOLWH LEXIS 36 (Nov. 22, 1978)...4

Ellen C. Kearns, The Fair Labor Standards Act (2d Ed. 2010) 3

Newberg on Class Actions, Fourth 16

Plaintiff Matthew Schaub ("Plaintiff") respectfully submits this brief in support of his "Unopposed Motion for Approval of the Class/Collective Action Settlement and Related Relief." The settlement of this class/collective action lawsuit creates a *non-reversionary* settlement fund of $1,290,000 that, contingent on Court approval, will be distributed as follows: (i) $915,050 will be paid to 990 class members who have returned claim forms; (ii) $22,950 will be paid to 306 class members who have not returned claim forms; (iii) $15,000 will be paid to the Plaintiff as a service award; and (iv) $337,000 in attorney's fees and expenses will be awarded to the law firm of Winebrake & Santillo, LLC ("class counsel"). As discussed herein, the Court should approve the notice and claim procedures implemented by the claims administrator, see Section IV.A; certify the Rule 23 settlement class, see Section IV.B; certify the FLSA settlement collective, see Section IV.C; approve the settlement as fair, reasonable, and adequate, see Section IV.D; and approve the requested service award, attorney's fees, and expenses, see Sections IV.E-G.

I. THE LEGAL CLAIMS AND LITIGATION RISKS

A. Plaintiff challenges Defendants' former tip-pooling practices.

Defendants Chesapeake & Delaware Brewing Holdings, LLC and Iron Hill Brewery, LLC ("Defendants") operate eleven Iron Hill Brewery & Restaurant locations throughout eastern Pennsylvania, New Jersey, and Delaware. Plaintiff works at Defendants' North Wales, PA restaurant as a server and bartender. See Complaint ("Cpl.") (Doc. 1) at ¶ 9.

Defendants' servers and bartenders are paid through a combination of (i) an hourly wage ranging between $2.13 and $5.00 and (ii) customer tips. Thus, in attempting to satisfy the federal and state requirements that employees receive a minimum wage, Defendants utilized a "tip credit" in an amount equal to the difference between the hourly wage actually paid by Defendants and the applicable minimum wage. For example, in Pennsylvania (where the federal and state minimum wage is $7.25/hour) Defendants generally pay servers and bartenders an hourly wage of $2.83. Thus, Defendants take a "tip credit" of $4.42/hour ($7.25 minus $2.83).

Meanwhile, Defendants' servers and bartenders generally contribute up to 3% of their gross sales to a "tip pool." A portion of these tip pool contributions are distributed to "Expediters" (a.k.a. "Expos"). See Cpl. at ¶ 11. These Expediters are generally positioned just outside the kitchen area, and their responsibilities include (but are not limited to) "traying" food orders for pick-up by the servers and bartenders. In this capacity, the Expediters act as intermediaries between the kitchen staff and the servers/bartenders.

This lawsuit concerns the interplay between Defendants' "tip credit" and "tip pooling" practices. The Fair Labor Standards Act ("FLSA") both: (i) allows a restaurant to utilize customer tips to satisfy a portion of its minimum wage obligations to servers/bartenders and (ii) permits "the pooling of tips" among restaurant employees. See 29 U.S.C. § 203(m). But there's a catch: restaurants utilizing tips to satisfy their minimum wage obligations may not allow tip pool proceeds to be shared with restaurant employees who do not "customarily and regularly receive tips." 29 U.S.C. § 203(m).

Many (but not all) courts have held that, in order to be the type of employee who "customarily and regularly receive[s] tips" (and, therefore, may participate in a tip pool), a restaurant employee must have some degree of "customer interaction." Ford v. Lehigh Valley Restaurant Group, Inc., 2014 U.S. Dist. LEXIS 92801, *13 (M.D. Pa. July 9, 2014); see also Montano v. Montrose Restaurant Associates, Inc., 800 F.3d 186, 193 (5th Cir. 2015) ("in determining whether an employee customarily and regularly receives tips, a court – or a factfinder – must consider the extent of an employee's customer interaction."). No clear rule exists regarding how much "customer interaction" is sufficient. Judge Munley has observed that "more than *de minimis* direct customer interaction" is required. Ford, 2014 U.S. Dist. LEXIS 92801, at *10. Other courts have made similar observations. See, e.g., Pedigo v. Austin Rumba, Inc., 722 F. Supp. 2d 714, 730 (N.D. Tx. 2010) (requiring "more than minimal customer interaction").

In this lawsuit, the parties hotly dispute whether the Expediters engage in enough customer interaction to warrant participation in the tip pool. If the Expediters' level of customer interaction is sufficient, then Defendants would win this case. On the other hand, if the Expediters' level of customer interaction is insufficient, then Defendants have violated the tip-pooling rules, and their utilization of the tip credit would be in serious jeopardy as to Plaintiff and, depending on class/collective certification rulings, possibly other servers/bartenders.

B. Plaintiff and the class face significant litigation risks.

Absent settlement, Plaintiffs would need to overcome several significant litigation risks in order to win this lawsuit. These risks are summarized below:

First, as already mentioned, the factfinder could conclude that the Expediters' level of customer interaction was sufficient to justify their participation in the tip pool. During discovery, Defendants produced credible evidence that Expediters regularly assisted servers and bartenders by, *inter alia*, running food to tables. See, e.g., Defendants' Declarations (Ex. 5).

Second, the factfinder could possibly credit Defendants' assertion that the tipping-out of Expediters was voluntary. Although the law is not fully developed regarding this "voluntariness" defense, some judges and commentators have given the defense credence. See, e.g., Ellen C. Kearns, The Fair Labor Standards Act (2d Ed. 2010) at p. 9-39 ("The [FLSA] does not govern voluntary tip sharing as long as it is truly voluntary and free of coercion or control by the employer and the employer plays no role in the distribution of the tips."). Absent settlement, Defendants would contend that the Expediter tip-outs were voluntary.

Third, absent settlement, Defendants would vigorously assert that the FLSA claim is covered by a two-year limitations period rather than the three-year period encompassed in the settlement. FLSA claims must be "commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). A violation is "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S. Ct. 1677, 1681, 100 L. Ed. 2d 115, 123 (1988). An employer who acts "unreasonably, but not recklessly, in determining its legal obligation" can escape a willfulness finding. Id. at 135 n. 13, 108 S. Ct. at 1682 n. 13, 100 L. Ed. 2d at 124 n. 13. Here, Defendants have a viable defense to any willfulness claim.

Fourth, Defendants argue that, even if they violated the tip-pooling rules, Plaintiff and other servers/bartenders can only recover damages for those work hours in which an Expediter actually was assigned to their shifts. No court within the Third Circuit has addressed this argument.

Fifth, Defendants assert that, even if they violated the tip-pooling rules, the damages owed to Plaintiff and other servers/bartenders are strictly limited to the return of the tips actually contributed to Expediters. Such damages would be relatively modest, since servers/bartenders contributed less than 1% of their gross receipts to Expediters. Defendants support their damages argument with some authority. See, e.g., U.S. Dept. of Labor Wage & Hour Opinion Letter No. WH-489, 1978 DOLWH LEXIS 36 (Nov. 22, 1978). Plaintiff vigorously disagrees based on authority that restaurants violating the tip-pooling rules must reimburse servers for the entire difference between the hourly wage actually paid by the restaurant and the statutory minimum wage. See Pedigo, 722 F. Supp. 2d at 721-22; Chung v. The New Silver Palace Restaurant, Inc., 246 F. Supp. 2d 220, 231 (S.D.N.Y. 2002). While Plaintiff believes he has the better argument, neither the Third Circuit nor any district court within the Third Circuit has addressed this issue. So it remains a litigation risk with significant implications on the available damages.

II. MEDIATION AND SETTLEMENT

A. The parties engage in discovery.

After the close of the pleadings, the parties proceeded with discovery. Each side served and responded to interrogatories and document requests. Defendants produced relevant policy documents and thousands of lines of electronic payroll data in a format that enabled Plaintiffs' counsel to calculate the potential unpaid wages on a class-wide basis. Also, Defendants took Plaintiff's deposition, while Plaintiff deposed Defendants' head of human resources and head of payroll. Finally, in addition to formal discovery, the parties' counsel interviewed various restaurant employees and, for some employees, obtained sworn declarations addressing the role of Expediters at Defendants' restaurants.

B. Settlement is reached at mediation with Judge Welsh.

During the April 19, 2016 initial case management conference, the Court established a July 7, 2016 deadline for the parties to conduct a settlement conference with Judge Heffley. See Doc. 12 at ¶ 7. The settlement conference was cancelled after the parties informed Judge Heffley that they had retained retired Eastern District Magistrate Judge Diane Welsh to serve as a third-party mediator. See Doc. 15.

On June 27, 2016, after analyzing all of the evidence, the parties participated in an all-day mediation with Judge Welsh. Prior to mediation, the parties exchanged detailed position statements. The mediation was attended by defense counsel, three of Defendants' highest-ranking executives, class counsel, and Plaintiff. The mediation lasted all day and, after substantial arms-length bargaining, resulted in the settlement outlined below:

C. The settlement terms.

The Revised Class/Collective Action Settlement Agreement (as amended after the preliminary approval hearing and preliminarily approved by the Court) is attached as Exhibit 1. The Agreement's material terms are briefly summarized below.

1. The class is defined to include servers and bartenders.

For purposes of settlement only, the parties agree to certification of the following Rule 23 class: All individuals who: (i) worked as servers or bartenders at any Iron Hill Brewery and Restaurant located in Pennsylvania during the time period between February 17, 2013 and June 30, 2016 and/or (ii) worked as servers or bartenders at any Iron Hill Brewery and Restaurant located in Delaware or New Jersey during the time period between July 1, 2013 and June 30, 2016.[1] A total of 1,296 individuals fall within this class definition.

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[1] Here is the explanation for why the class period for Pennsylvania class members begins on February 17, 2013, while the class period for Delaware and New Jersey class members begins later on July 1, 2013: In FLSA collective actions (unlike Rule 23 class actions) a covered worker does not toll the running of the statute of limitations on her FLSA claim until she affirmatively joins the lawsuit. See Taylor v. Pittsburgh Mercy Health System, Inc., 2009 U.S. Dist. LEXIS 40080, *2 (W.D. Pa. May 11, 2009). Here, Plaintiff commenced this action on February 17, 2016 and asserted *both* (i) an FLSA claim on behalf of a three-state (Pennsylvania, Delaware, New Jersey) collective and a Pennsylvania Minimum Wage Act ("PMWA") 43 P.S. §§ 333.101, *et seq* claim on behalf of a *Pennsylvania* class. See Doc. 1. Plaintiff (having only worked in Pennsylvania) did not assert any state law class action claims under Delaware or New Jersey law. Because Plaintiff's filing the PMWA class action claim tolled the running of the limitations period for all putative Pennsylvania class members, see American Pipe and Construction Co. v. State of Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), and because the PMWA carries a three-year limitations period, see Cerutti v. Frito Lay, Inc., 777 F. Supp. 2d 920, 925 n. 4 (W.D. Pa. 2011), the putative Pennsylvania class members enjoy the benefit American Pipe tolling backwards to February 17, 2013 (three years prior to the February 17, 2016 commencement of this lawsuit). The Delaware and New Jersey workers, meanwhile, were not

2. Defendants create a non-reversionary $1,290,000 settlement fund.

Defendants have agreed to create a total settlement fund of $1,290,000. See Agreement at p. 4 (defining "Maximum Settlement Amount"). Crucially, no portion of this payment will revert to Defendants.

If the Court approves the requested service award and attorneys' fees/expenses, the Net Settlement Fund will equal $938,000. This Net Settlement Fund will be distributed to class members as follows: (i) every class members who has not excluded himself/herself from the settlement will receive a $75 payment and (ii) the remaining portion of the Net Settlement Fund will be paid to class members who returned claim forms based primarily on each claimant's *pro rata* share of the total worked during the class period as a server or bartender. See Agreement (Ex. 1) at p. 4 (defining "Settlement Percentage" and "Settlement Share") and ¶¶ 10-11.

In addition, subject to Court approval, a $15,000 service award will be paid to Plaintiff, see Agreement (Ex. 1) at ¶ 13, and $337,000 in fees and expenses will be paid to class counsel, see id. at ¶ 12. Any disapproved service award, fees, or expenses will be allocated to claimants by increasing the "Net Settlement Fund" under the payout formula. See id. at p. 4.

3. Defendants have discontinued the challenged Expediter tip-out policy.

The settlement requires Defendants to discontinue the practice of requiring or permitting servers/bartenders to share tips with Expediters. See Agreement (Ex. 1) at ¶ 14. Defendants complied with this requirement on August 29, 2016.

4. The release is limited, and only claimants waive FLSA rights.

In exchange for the above consideration, all class members who do not exclude themselves from the settlement release Defendants from all claims arising during the class period

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covered by any Rule 23 class action claims. Instead, these workers are only covered by the FLSA collective action claim, and, as already noted, do not benefit from American Pipe tolling.

and asserted in or reasonably related to this action, including all such claims arising under the PMWA, the Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1 *et seq.*, the New Jersey Wage and Hour Law, N.J.S.A. §§ 34:11-56a, *et seq.*, the New Jersey Wage Payment Law, N.J.S.A. §§ 34.11-4.1, *et seq.*, the Delaware Minimum Wage Act, 19 Del. Code Ann. §§ 901, *et seq.*, the Delaware Wage Payment and Collection Law, 19 Del. Code Ann. §§ 1101, *et seq.*, or any other federal, state, or local statute, regulation, ordinance, or common law legal theory. See Agreement at p. 3 (defining "Released Claims") and ¶ 5.

Importantly, only those class members who return claim forms waive their FLSA claims. See Agreement (Ex. 1) at ¶ 4.[2]

III. PRELIMINARY APPROVAL, THE NOTICE/CLAIM PROCESS, AND THE ANTICIPATED SETTLEMENT PAYOUTS.

A. The Court preliminarily approves the settlement.

On August 8, 2016, the Court entered an order preliminarily approving the settlement. See Doc. 26. Therein, the Court: found that subject mater jurisdiction over all claims was proper, see id. at ¶ 3; found that the settlement satisfied the preliminary approval standards, see id. at ¶ 4; preliminarily certified the Rule 23 settlement class, see id. at ¶ 5; appointed Plaintiff to serve as the class representative, see id. at ¶ 6; appointed Winebrake & Santillo, LLC to serve as class counsel, see id. at ¶ 7; approved of Settlement Services, Inc. to serve as the settlement administrator, see id. at ¶ 8; scheduled the final approval hearing for November 9, 2016, and required class counsel to submit all final approval papers by November 1, 2016, see id. at ¶¶ 9 and 11; approved the notice and claim forms and ordered the administrator to send (by both

[2] FLSA civil actions only bind those individuals who affirmatively join the action. See 29 U.S.C. § 216(b). Thus, since the claim form is the only vehicle by which putative collective members join this action, non-Claimants do not waive their FLSA claims and are free to file their own FLSA lawsuits.

regular mail and email) the notice packages to the class members by August 15, 2016 and to re-send (by both regular mail and email) the notice packages to the non-responsive class members by September 26, 2016, see id. at ¶ 10(a); ordered class counsel to create a page on its website providing class members with various information regarding the litigation and the settlement, see id. at ¶ 10(b); and set an October 17, 2016 deadline for class members to object to or exclude themselves from the settlement, see id. at ¶¶ 12-17.

B. The Court-approved notice process yields excellent results.

Upon preliminary approval, all counsel and the administrator worked cooperatively and diligently to implement the Court-approved notice process. Class counsel created the Court-mandated website page, see Declaration of R. Andrew Santillo ("Santillo Dcl.") (Ex. 3) at ¶ 24, and, on August 15, 2016, the administrator mailed to 1,264 class members the Court-approved notice and claim forms and a postage-paid return envelope bearing a return address, see Declaration of Mark Patton ("Patton Dcl.") (Ex. 2) at ¶ 4. The administrator also emailed the notice and claim forms to 1,224 class members for whom email addresses had been located. See id. After the August 15 mailing, the parties discovered that 32 additional class members were erroneously left off the class list. The administrator mailed notice packages to 27 such class members on August 30, 2016, and to 5 such class members on September 26, 2016.[3] See id. On September 26, 2016, the administrator completed a second-round of mailings to 691 class members who had not yet returned claim forms. See id. at ¶ 5. During the notice period, the administrator promptly re-mailed 21 notice packages that were returned with a forwarding

[3] Notably, the 32 individuals who received delayed notice have returned claim forms at a rate that is slightly *higher* than the return rate for the 1,264 class members who were sent the August 15 mailing. In particular, claim forms have been returned by 23 of the 27 of the class members who were mailed the August 30 notice packages and by 4 of the 5 class members who were mailed the September 26 notice packages. See October 31, 2016 Email from Stephen Donaldson to Class Counsel (Ex. 6).

address and located alternative addresses for 51 of 76 notice packages that were returned as undeliverable. See id. at ¶ 6.

The above notice process has yielded excellent results. To date, 990 of the 1,296 class members (or **76.39%**) have returned claim forms. See Patton Dcl. (Ex. 2) at ¶ 7. Moreover, no class members have excluded themselves from the settlement, and no class members have objected. See id. at ¶¶ 8-9.

C. The class members will share $938,000.

Under the settlement payout formula, the 306 class members who neither excluded themselves from the settlement nor returned claim forms will each receive a non-payroll check in the amount of $75. These non-claimant payouts total $22,950 (306 X $75). The remaining $915,050 ($938,000 Net Settlement Fund *minus* $22,950) is distributed to the 990 claimants pursuant to the payout formula, which divides the proceeds based on each claimant's *pro rata* share of server/bartender work hours (after giving each claimant a $75 payment). See Agreement (Ex. 1) at p. 4 (defining "Settlement Percentage" and "Settlement Share").

Here are some basic statistics regarding the distribution of $915,050 to the 990 claimants: the average payout is $924.29; the median payout is $661.18; the lowest payout is $75.09; and the highest payout is $4,178.31. See Santillo Dcl. (Ex. 3) at ¶ 26. Moreover, the settlement payouts fall into the following ranges:

Quintile:	**Payout Range:**
Top Quintile	$1,572.81 - $4,178.31
Fourth Quintile	$871.75 - $1,557.14
Third Quintile	$480.32 – $868.84
Second Quintile	$252.24 - $478.40
Bottom Quintile	$75.09 - $250.86

Id. at ¶ 27.

Finally, applying the pertinent settlement payout formula to the hours worked by the 306 non-claimants, the average payout would be $317.32 (compared to $924.29 for the 990 claimants) and the median payout would be $208.09 (compared to $661.18 for the 990 claimants). See Santillo Dcl. (Ex. 3) at ¶ 28. This analysis confirms the common sense notion that many non-claimants were short-term employees without much "skin in the game."

IV. ARGUMENT

As discussed below, Plaintiff requests that the Court: approve the settlement notice and claim process as implemented by the administrator, see Section IV.A; certify the Rule 23 settlement class, see Section IV.B; certify the FLSA settlement collective, see Section IV.C; approve the settlement as fair, reasonable, and adequate, see Section IV.D; approve the service awards to Plaintiffs, see Section IV.E; and approve the payment of attorney's fees and expenses to class counsel, see Section IV.F-G.

A. The notice and claim process, as implemented by the administrator warrant approval.

Courts presiding over Rule 23(b)(3) class actions must ensure that class members receive "the best notice that is practicable under the circumstances." Fed. R. Civ. P 23(c)(2)(B); see also Fed. R. Civ. P. 23(e)(1) (when class action settled, court "must direct notice in a reasonable manner to all class members who would be bound by the proposal").

Here, the notice and claim easily satisfy Rule 23's safeguards. First, the form and content of the notice already was approved by the Court at the preliminary approval stage. See Doc. 10. This is not surprising since the notice is written in "plain, easily understood language," Fed. R. Civ. P. 23(c)(2)(B), and covers all of the subject areas described in items (i)-(vii) of Rule 23(c)(2)(B).

Moreover, the process by which the notice packages were distributed to class members was both vigorous and effective. As Judge Goldberg has observed, "[i]ndividual notice by first-class mail is the best notice practicable in this case, and has long been considered to satisfy due process in the class-action context." Dugan v. Towers, 2013 U.S. Dist. LEXIS 136305, *16-17 (E.D. Pa. Sept. 24, 2013). Here, the administrator sent the notice packages (which included a postage-paid return envelope that class member could use to return his/her claim form, exclusion request, or objection), emailed the notice and claim forms to all class members for whom emails could be obtained, promptly re-mailed all packages returned with a forwarding address, obtained (to the greatest extent possible) replacement addresses for all class members whose packages were returned without a forwarding address, and sent (by regular mail and email) a second batch of notice packages to all class member who had not filed claims in the first-half of the notice period. See Section III.B supra. Moreover, per the Court's instructions, class counsel created a website page that included copies of the notice and claim forms and other information relevant to the settlement and litigation. See Santillo Dcl. (Ex. 3) at ¶ 24. Finally, the administrator and all counsel worked cooperatively to facilitate the notice and claim process, fielding many class member phone calls and permitting class members to return claim forms by mail, fax, or email.

The results of the above process speak for themselves. To date, 76.31% of the 1,296 class members have filed claim forms, and many of those who did not file claims were short-term employees. See Section III.C supra. This excellent outcome exemplifies why the Court should endorse the notice and claim process.[4]

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[4] It seems like Federal Judges are becoming increasingly skeptical of class action settlements in which unclaimed settlement funds revert to the settling defendant. "Reversionary" settlements usually are criticized because they allow class counsel to seek fees based on a percentage of an inflated "common fund" that includes money that will never be paid out to class members. However, an additional – and less discussed – criticism of reversionary settlements is that they create economic incentive for *low* claim rates. The 76.39% claim rate in this case demonstrates what happens when vigorous notice procedures are combined with a non-reversionary settlement fund and a provision in which only claimants waive all of their legal claims. In such cases, all parties are incentivized to maximize class member participation.

B. The Court should certify the Rule 23 settlement class.

Even settled class actions must satisfy Rule 23's class certification requirements. See, e.g., In re NFL Players Concussion Injury Litig., 821 F.3d 410, 426-35 (3d Cir. 2016); Vasco v. Power Home Remodeling Group LLC, 2016 U.S. Dist. LEXIS 141044, *5-11 (E.D. Pa. Oct. 12, 2016) (Kearney, J.); Rougvie v. Ascena Retail Group, Inc., 2016 U.S. Dist. LEXIS 99235, *36-42 (E.D. Pa. July 29, 2016) (Kearney, J.). Thus, Plaintiffs must "satisfy four prerequisites to be certified: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." Reyes v. Netdeposit, LLC, 802 F.3d 469, 482 (3d Cir. 2015) (citing Fed. R. Civ. P. 23(a)). In addition, since certification is sought under Civil Rule 23(b)(3), the Court also must find: (5) that common questions of law or fact "predominate over any questions affecting only individual members" and (6) "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

As discussed below, each class certification requisite is satisfied in this case:

Numerosity: The numerosity requirement "is generally satisfied if there are more than 40 class members." NFL Players, 821 F.3d at 426 (citing Marcus v. BMW of North America, LLC, 687 F.3d 583, 595 (3d Cir. 2012). Here, numerosity exists because the settlement class includes 1,296 individuals, 990 of whom have returned claim forms.

Commonality: The commonality "bar is not a high one," Rodriguez v. National City Bank, 726 F.3d 372, 382 (3d Cir. 2013), and "is easily met," Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994). Commonality "does not require perfect identity of questions of law or fact among all class members." Reyes, 802 F.3d at 486. Since "'even a single common question will do,'" id. (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)), commonality is satisfied if "'plaintiffs share at least one question of fact or law with the grievances of the prospective class,'" id. (quoting Rodriguez, 726 F.3d at 382).

Here, the class members have much in common. Indeed, the Court's preliminary approval order cogently lists four common issues that continue to persist at the final approval stage. See Doc. 26 at ¶ 5(a)(c)(1)-(4).

Typicality: Class members' claims must be "typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). This requirement ensures that "the interests of the class and the class representatives are aligned so that the latter will work to benefit the entire class through the pursuit of their own goals." NFL Players, 821 F.3d at 427-28 (internal quotations and citations omitted). The Third Circuit has "set a 'low threshold' for typicality." Id. at 428 (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001)). "'Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct." In re: Prudential Insurance Co. America Sales Practice Litig., 148 F.3d 283, 311 (3d Cir. 1998) (quoting Baby Neal, 43 F.3d at 58); accord NFL Players, 821 F.3d at 428.

Here, typicality is satisfied because Plaintiff pursues the same legal claims and theories as the class and is subjected to the same payout formula and release terms. His interests are entirely aligned with those of the class.

Adequacy: Class representatives must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is satisfied if both: "(a) the plaintiff's attorney [is] qualified, experienced, and generally able to conduct the proposed litigation, and (b) the Plaintiff [does] not have interests antagonistic to those of the class," Weiss v. York Hospital, 745 F.2d 786, 811 (3d Cir. 1984) (internal quotations omitted).

Here, adequacy is easily satisfied. Class counsel are experienced in wage and hour law, see Santillo Dcl. (Ex. 3) at ¶¶ 3-17, and the Court already has appointed them to represent the class, see Doc. 26 at ¶ 7. Second, Plaintiff has no interests that are antagonistic to the class. On the contrary, as discussed in Section IV.E infra, Plaintiff has been an especially diligent representative of the class' interests.

Predominance: Civil Rule 23(b)(3)'s first requirement is that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The predominance inquiry:

> asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

Tyson Foods, Inc. v. Bouaphakeo, __ U.S. __, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124, 134 (2016).

Here, predominance is met because, as the Court observed at the preliminary approval stage, "the predominant issue is whether Defendants' practices are in accordance with applicable wage laws." Doc. 26 at ¶ 5(g).

Superiority: Civil Rule 23(b)(3) also requires the Court "to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication," Prudential, 148 F.3d at 316, and "sets out several factors relevant to the superiority inquiry," id. at 315-16. As discussed below, these factors favor class certification:

First, Civil Rule 23(b)(3)(A) requires the Court to consider "the class members interests in individually controlling the prosecution . . . of separate actions" and generally disfavors certification where class members maintain "a high degree of emotional involvement, extremely large [individual] damages claims, and a desire to tailor trial tactics to individual needs." Newberg on Class Actions, Fourth, at §4:29. This action, which concerns relatively low-value wage claims that do not carry any possibility of compensatory damages, is precisely the type of litigation that benefits from the class action device.[5]

Second, Civil Rule 23(b)(3)(B) requires courts to consider "the extent and nature of any litigation concerning the controversy already begun by . . . class members." Plaintiffs' counsel is not aware of other such litigation.

Third, Civil Rule 23(b)(3)(C) asks the court to consider the desirability of "concentrating the litigation of the claims in a particular forum." Here, it makes sense for this class action to be litigated in this Court, since most of Defendants' restaurants are within this judicial district.

Fourth, Civil Rule 23(b)(3)(D) requires the court to consider any "likely difficulties in managing the class action." This requirement is not applicable to settled cases. See Amchem, 521 U.S. at 620 117 S. Ct. at 2248, 138 L. Ed. 2d at 710; Sullivan v. DB Investments, Inc., 667 F.3d 273, 302-03 (3d Cir. 2011).

In sum, the proposed class satisfies all of Rule 23's class action requirements.

C. The Court should certify the FLSA settlement collective.

Under the FLSA, conditional certification facilitates notice of the lawsuit (and, in this case, the settlement) to putative collective members so they can decide whether to join the collective. See Zavala v. Wal Mart Stores, Inc., 691 F.3d 527, 536 (3d Cir. 2012). Later, after the notice process has run its course and workers have joined the collective, the Court can determine whether to grant final certification of the collective. See id. at 536-37. Final certification is proper if the opt-in plaintiffs are "similarly situated" based on the consideration of various factors, including: whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same relief; and whether they have similar salaries and circumstances of employment." Id.

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[5] See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689, 709 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

The Third Circuit has not addressed whether courts reviewing "hybrid" class/collective settlements are required to "certify" the collective under the Zavala factors.[6] However, because some district courts have done so, see, e.g., Rouse v. Comcast Corp., 2015 U.S. Dist. LEXIS 49347, *13-15 (E.D. Pa. Apr. 15, 2015), Plaintiff will address the Zavala factors:

Zavala Factor 1 – Whether the collective members are employed in the same corporate department, division, and location: This factor favors certification because, as already discussed, all collective members worked in Defendants' restaurants as servers and/or bartenders and were paid pursuant to the same Expediter tip-out policy.

Zavala Factor 2 – Whether collective members advance similar claims: This factor favors certification for the reasons already described in the Rule 23 "commonality" discussion.

Zavala Factor 3 – Whether collective members seek substantially the same relief: This factor favors certification for the reasons described in the Rule 23 "typicality" discussion.

Zavala Factor 4 – Whether collective members have similar salaries and circumstances of employment: This factor favors certification for the reasons described in the Rule 23 "commonality" and "predominance" discussion.

In sum, all of the Zavala factors favor of final certification of the FLSA collective.

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[6] In some respects, such analysis seems unnecessary, since certification under the FLSA is less stringent than certification under Rule 23. See DeSilva v. North Shore-Long Island Jewish Health Sytem, Inc., 27 F. Supp. 3d 313, 328 (E.D.N.Y. 2014); Goldman v. RadioShack Corp., 2006 U.S. Dist. LEXIS 2433, *22-25 (E.D. Pa. Jan. 23, 2006).

D. The Settlement should be approved as fair, reasonable, and adequate.

Rule 23 class action settlements that bind absent class members must be approved by the Court as "fair, reasonable, and adequate." See Fed. R. Civ. P. 23(e)(2). Also, although the Third Circuit has not yet addressed the issue, it is well accepted that FLSA settlements not supervised by the U.S. Department of Labor must be approved by the Court as "'a fair and reasonable resolution of a bona fide dispute over FLSA provisions.'" See Adams v. Bayview Asset Management, LLC, 11 F. Supp. 3d. 474, 476 (E.D. Pa. 2014); see generally Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015). Finally, where the FLSA action is settled on a *collective* basis, district courts within the Third Circuit generally apply the same approval criteria applied to Rule 23 class actions. See In re Chickie's & Pete's Wage & Hour Litig., 2014 U.S. Dist. LEXIS 30366, *7-8 (E.D. Pa. Mar. 7, 2014).[7]

Based on the above, Plaintiffs, in advocating for Court approval of this "hybrid" class/collective action settlement, will proceed under the well-established Rule 23 criteria. Such an approach has been followed in many other hybrid actions. See, e.g., Ford v. Lehigh Valley Restaurant Group, Inc., 2016 U.S. Dist. LEXIS 31732 (M.D. Pa. Mar. 10, 2016); Rouse, 2015 U.S. Dist LEXIS 49347. As discussed below, Court approval is warranted:

1. The settlement is entitled to a presumption of fairness.

"The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." In re: General Motors Pick-Up Truck Fuel Tank Products Liability Litig., 55 F.3d 768, 784 (3d Cir. 1995). In

[7] See, e.g., Iwaskow v. JLJJ, Inc., 2016 U.S. Dist. LEXIS 136676 (M.D. Pa. Sept. 28, 2016); Pacheco v. Vantage Foods, Inc., 2016 U.S. Dist. LEXIS 16709 (M.D. Pa. Feb. 11, 2016); Calarco v. Healthcare Services Group, Inc., 2015 U.S. Dist. LEXIS 46950 (M.D. Pa. Apr. 7, 2015); but see Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516, 523 n. 3 (E.D. Pa. 2016) (questioning whether it really makes sense to apply Rule 23 approval standards to FLSA collective action settlements).

reviewing a class action settlement:

> The role of a district court is not to determine whether the settlement is the fairest possible resolution—a task particularly ill-advised given that the likelihood of success at trial (on which all settlements are based) can only be estimated imperfectly. The Court must determine whether the compromises reflected in the settlement—including those terms relating to the allocation of settlement funds—are fair, reasonable, and adequate when considered from the perspective of the class as a whole.

In re Baby Products Antitrust Litig., 708 F.3d 173-74 (3d Cir. 2013).

Consistent with the above principles, the Third Circuit "appl[ies] an initial presumption of fairness in reviewing a class settlement when: '(1) the negotiations occurred at arms length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" NFL Players, 821 F.3d at 436 (quoting In re: Cendant Corp. Litig., 264 F.3d 201, 232 n. 18 (3d Cir. 2001)). Here, application of these criteria demonstrates that a presumption of fairness is warranted:

First, the negotiations "occurred at arms length." In particular, the settlement was reached after an all-day mediation session with Judge Welsh. See Section II.B supra.

Second, the negotiations were reached after the parties completed "sufficient discovery". As discussed in Section II.A supra.

Third, Class Counsel "are experienced in similar litigation." See Santillo Dcl. (Ex. 3) at ¶¶ 3-17.

Fourth, no class members have objected to or excluded themselves from the settlement.

2. The Girsh, Prudential, and Baby Products factors favor approval.

Under Third Circuit law, class action settlements are scrutinized under an extensive collection of factors and considerations. Initially, in Girsh v. New America Fund, Inc., 521 F.2d 153 (3d Cir. 1975), the Third Circuit "noted nine factors to be considered when determining the fairness of a proposed settlement." NFL Players, 821 F.3d at 437 (listing 9 Girsh factors). Later, in In re Prudential Insurance Company America Sales Practice Litig., 148 F.3d 283 (3d Cir. 1998), the Third Circuit determined that "it might be useful" to expand the analysis to include five additional "permissive and non-exhaustive factors." NFL Players, 821 F.3d at 437 (listing 5 Prudential factors).[8] Finally, in Baby Products, 708 F.3d 163, the Third Circuit observed that "one additional inquir[y] for a thorough analysis of settlement terms is the degree of direct benefit provided to the class." Id. at 174.

With the above in mind, Plaintiff turns to the nine Girsh factors, the six Prudential factors, and the one additional Baby Products factor:

Girsh Factor 1 – Complexity, Expense and Likely Duration of the Litigation: This factor favors approval because, in the absence of settlement, this litigation would entail a series of complex litigation events, including, but not limited to, Plaintiffs' motion for conditional certification of the FLSA collective and Court supervised notice, completion of the FLSA notice process, post-notice discovery (which probably would include redundant depositions of sample collective members), a motion to certify the Rule 23 class, a motion to "decertify" the FLSA collective, summary judgment motions, expert damages reports, expert discovery, and complicated *in limine* motions addressing the extent to which "representative" testimony and evidence should be permitted.

Girsh Factor 2 – Reaction of the Class to the Settlement: This factor favors approval because no class members have objected to or sought exclusion from the settlement.

Girch Factor 3 – Stage of the Proceedings and the Amount of Discovery Completed:

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[8] Importantly, unlike the Girsh factors, "the Prudential considerations are merely "illustrative of additional inquiries that in many cases will be useful for a thoroughgoing analysis of a settlement's terms." In re Pet Food Products Liability Litig., 629 F.3d 333, 350 (3d Cir. 2010); accord NFL Players, 821 F.3d at 437.

This factor – which addresses "whether counsel had an adequate appreciation of the merits of the case before negotiating," see Cendant, 264 F.3d at 235 – favors approval. Here, settlement was reached after the parties completed preliminary discovery, which included a review of all relevant policy documents, extensive analysis of payroll and timekeeping data, and employee interviews. See Section II.A supra.

Girsh Factors 4 and 5 – Risk of Establishing Liability and Proving Damages: These factors "examine what the potential rewards (or downside) of the litigation had class counsel elected to litigate the claims rather than settle them." General Motors, 55 F.3d at 814. As already explained, the legal claims asserted in this action carried significant risk. See Section I.B supra (discussing five separate litigation risks regarding merits and damages issues). In sum, this is a very tough case.

Girsh Factor 6 – Risks of Maintaining the Class Through Trial: This factor also favors approval of the settlement. While Plaintiff believes that the class and collective should be certified for the reasons described in Section IV.B supra, it is possible that Defendants could defeat class certification or "decertify" any FLSA collective by arguing, among other things, that an assessment of Expediters' customer interaction can only be done on a restaurant-by-restaurant basis or even on an Expediter-by-Expediter basis.

Girsh Factor 7 – Ability of Defendant to Withstand a Greater Judgment: Defendants ability to pay was considered at the mediation before Judge Welsh. However, as in many cases, did not play a substantial role in the negotiation. Under such circumstances, "the fact that [a corporate defendant] could afford to pay more does not mean that it is obligated to pay any more than what the [class members] are entitled to under the theories of liability that existed at the time the settlement was reached." In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 538 (3d

Cir. 2004). Thus, if the settlement is otherwise fair and reasonable, this factor is "a wash and weighs neither in favor of nor against settlement." Craig v. Rite Aid Corp., 2013 U.S. Dist. LEXIS 2658, *40 (M.D. Pa. Jan. 7, 2013); accord Haught v. Summit Resources, LLC, 2016 U.S. Dist. LEXIS 45054, *17-18 (M.D. Pa. April 4, 2016); Lazy Oil v. Witco Corp., 95 F. Supp. 2d 290, 318 (W.D. Pa. 1997).

Girsh Factors 8-9 – The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and the Attendant Risks of Litigation: These factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." Warfarin, 391 F.3d at 538. The question is whether, in light of these risks, the settlement class is getting "good value." Id.

These factors favor approval. As already discussed, this litigation carries significant litigation risks, making it possible that Plaintiff and other class members could either lose this case or have their damages significantly diminished. See Section I.B supra. Meanwhile, the 990 class members who filed claims are getting significant money recoveries, as summarized in Section III.C supra. Moreover, the average payout of $924.29 per claimant compares favorably to the average payouts in similar cases. See, e.g., Ford, 2016 U.S. Dist. LEXIS 31732 (granting final approval of settlement that distributes $813,725 to 876[9] claimants for average payout of $928); Bourne v. Ansara Restaurant Group, Inc., 2016 U.S. Dist. LEXIS 14399 (E.D. Mich. Aug. 26, 2016) (preliminarily approving claims-made settlement in which $445,000 is made available for 1,832 potential claimants).

Prudential Factor 1 – Maturity of the underlying substantive issue: This factor favors appeal because the substantive law is sufficiently developed to enable class counsel to analyze the litigation risks. See Section I.A supra.

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[9] Although Judge Munley's decision does not state that Ford included 876 claimants, the undersigned – who served as class counsel – knows this to be true).

Prudential Factor 2 – Existence and probable outcome of claims by other classes and subclasses: Because no other classes or subclasses have claims against Defendants, this factor is inapplicable.

Prudential Factor 3 – Comparison between the results achieved by the settlement for individual class members and the results achieved – or likely to be achieved – for other claimants: Class counsel has not been able to find any cases containing a substantive discussion of this factor. Judge Bechtle equated the factor to the eighth and ninth Girsh factors. See In re Diet Drugs, 2000 U.S. Dist. LEXIS 12275, *192 (E.D. Pa. Aug. 28, 2000). As such, Plaintiff submits that this factor – if considered – favors approval for the reasons already discussed.

Prudential Factor 4 – Whether class members are accorded the right to opt out of the settlement: This factor favors approval because all class members were provided an opportunity to exclude themselves from the settlement. Moreover, class members who did not return claim forms retain their right to assert future FLSA claims.

Prudential Factor 5 – Whether any provisions for attorney's fees are reasonable: This factor favors approval because, as discussed in Section IV.F infra, the attorney's fees sought by class counsel are reasonable.

Prudential Factor 6 – Whether the procedure for processing individual claims under the settlement is fair and reasonable: This factor appears to apply to settlements in which class member's entitlement to relief entails an evaluation of individualized criteria. See, e.g., Diet Drugs, 2000 U.S. Dist. LEXIS 12275, at *193-94. This is not such a case. Here, each class member's entitlement to a settlement payment is clearly defined based on objective company payroll data and a specific payout formula. So this factor favors approval.

Baby Products Factor – Degree of direct benefit provided to the class: In creating this factor, the Third Circuit sought to guard against situations in which large portions of the settlement proceeds were *cy pres* recipients rather than the class members. See Baby Products, 708 F.3d at 171-76. This is not such a case. Here, the entire net settlement fund will be distributed to class members. While proceeds related to uncashed checks will be donated to the Pennsylvania IOLTA Board, such proceeds will be insignificant compared to the funds actually received by class members.

Summary of the Girsh, Prudential, and Baby Products Factors: To sum up, the Girsh, Prudential, and Baby Products factors heavily favor approval of the settlement.

E. The requested service award warrants approval.

Service awards compensate lead plaintiffs "for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws." Sullivan, 667 F.3d at 333 n.65. Service awards in the Third Circuit "have ranged from $1,000 up to $30,000." Craig, 2013 U.S. Dist. LEXIS 2658, at *50; see also Haught, 2016 U.S. Dist. LEXIS 45054, at *20-21. Moreover, service awards are "particularly appropriate" in employment rights cases because "the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers." Frank v. Eastman Kodak Co., 228 F.R.D. 174, 187-188 (W.D.N.Y. 2005).

The settlement allows Plaintiff to seek a service award of $15,000. See Agreement (Ex. 1) at ¶ 13. Such awards are in-line with awards in other wage and hour class actions. See, e.g., Taveres v. S-L Distribution Co., Inc., 2016 U.S. Dist. LEXIS 57689, *35-38 (M.D. Pa. May 2,

2016) ($15,000 service awards); Ford, 2016 U.S. Dist. LEXIS 31732, at *2-3 ($10,000 service awards); Creed v. Benco Dental Supply Co., 2013 U.S. Dist. LEXIS 132911, *19-20 (M.D. Pa. Sept. 17, 2013) ($15,000 service award).

Plaintiff deserves the above service award because he has been a stellar class representative. Plaintiff has played an active role in this litigation and has been in regular contact with class counsel at every stage of the proceedings. At the pre-suit stage, Plaintiff met with class counsel several times and gathered pertinent documents and information. At the discovery stage, he sat for an all-day deposition. At the settlement stage, he personally attended the all-day mediation and the preliminary approval hearing.

Prior to making contact with class counsel, Plaintiff – who remains employed by Defendants – performed his own internet research regarding the tip-sharing rules and, after concluding that there might be a legal violation, sought out class counsel. Thereafter, Plaintiff made a concerted effort to avoid gossiping about the lawsuit or otherwise disrupting the workplace. Instead, Plaintiff put his faith in the judicial system to remedy the perceived legal violation for himself and others. See Matthew Schaub Deposition Transcript Excerpts (Ex. 4).

F. The requested attorney's fees of $305,688 warrant approval.

The settlement contemplates $337,000 in attorney's fees and expenses. See Agreement (Ex. 1) at ¶ 12. Since Class Counsel's expenses approximate $31,312, see Santillo Dcl. (Ex. 3) at ¶ 23; Patton Dcl. (Ex. 2) at ¶ 10, the settlement results in an attorney's fee payment of $305,688, which equals approximately **23.7%** of the $1,290,000 settlement fund.

1. The preferred "percentage of the fund" method favors approval.

The "percentage of the fund" method of reviewing class action fee requests "is generally favored . . . because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." In re Rite Aid Corp. Securities Litig., 396 F.3d 294, 300 (3d Cir. 2005); accord In re: AT&T Corp. Securities Litig., 455 F.3d 160, 164 (3d Cir. 2006); Prudential, 148 F.3d at 333; General Motors, 55 F.3d at 821; see also Mabry v. Hildebrandt, 2015 U.S. Dist. LEXIS 112137, *9 (E.D. Pa. Aug. 24, 2015) ("percentage of recovery is the prevailing method used by courts in the Third Circuit for wage and hour cases").

Here, a "percentage of the fund" analysis favors approval because the $305,688 fee equals only *23.7%* of the *non-reversionary* settlement fund. As discussed below in the context of the seventh Gunter factor, such a percentage recovery is quite modest compared to recoveries in other wage and hour class/collective action settlements.

2. The Gunter/Prudential factors favor approval.

Moreover, in evaluating the reasonableness of class counsel's request for a fee equaling 23.7% of the settlement fund, the Court is expected to consider the seven factors described by the Third Circuit in Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000), and the three additional factors described by the Third Circuit in Prudential, supra. See AT&T, 455 F.3d at 165-66. As discussed below, these factors favor approval of the requested fee:

Gunter Factor 1 – The Size of the Fund Created and the Number of Persons Benefited: This factor favors approval because the settlement enables the 990 claimants to share in $915,050 free and clear of fees, expenses, and the service award, while the 306 non-claimants share in $22,950. The average per-claimant payout stands at $924.29, while the median payout stands at $661.18. As already discussed in addressing the Girsh factors, this constitutes an excellent result for the claimants.

Moreover, in considering the "number of persons benefited," class counsel emphasize that the settlement of this lawsuit *before* the issuance of FLSA notice resulted in a 76.39%

participation rate. Such a participation rate is far greater than the rate that would have been obtained if Defendants servers and bartenders were asked to join a contested FLSA lawsuit. Under such circumstances, participation rates generally fall between 15% and 25%.

Gunter Factor 2 – The Presence or Absence of Substantial Objections by Members of the Class: This factor favors approval because no class member has objected.

Gunter Factor 3 – The Skill and Efficiency of the Attorneys Involved: This factor favors approval because, as already discussed, class counsel are well-recognized as skilled wage and hour litigators. See Santillo Dcl. (Ex. 3) at ¶¶ 3-17. Moreover, class counsel have efficiently brought this matter to a fair and favorable resolution.

Gunter Factor 4 – The Complexity and Duration of the Litigation: This factor, which is identical to the first Girsh factor, favors approval.

Gunter Factor 5 – The Risk of Nonpayment: This factor favors approval because class counsel *always* works on a pure contingency fee basis. See Santillo Dcl. (Ex. 3) at ¶ 3. This makes non-payment a very real risk. See In re Lucent Technologies, Inc., 327 F. Supp. 2d 426, 438 (D.N.J. 2004).

Gunter Factor 6 – The Amount of Time Devoted to the Case: Class counsel has invested 260.9 attorney hours and 5.3 non-attorney hours on this litigation. See Santillo Dcl. (Ex. 3) at ¶ 22. Such a substantial time investment favors approval.

Gunter Factor 7 – The Awards in Similar Cases: This factor favors approval because the requested fee equals approximately 23.7% of the total settlement fund, which is *lower* than fee awards in many other class/collective wage and hour actions. See Mabry, 2015 U.S. Dist. LEXIS 112137, at *9 ("the recovery award in FLSA common fund cases ranges from roughly 20-45%"); Creed, 2013 U.S. Dist. LEXIS 132911, at *17 (observing in overtime rights class action that "an award of one-third of the settlement is consistent with similar settlements throughout the Third Circuit"); Ripley v. Sunoco, Inc., 287 F.R.D. 300, (E.D. Pa. 2012) (in wage/overtime class action, "fees of 33% of the settlement fund fall within the range recognized in the Third Circuit as reasonable"); see also Craig, 2013 U.S. Dist. LEXIS 2658, at *46-47 (citing cases).

Prudential Factor 1 – Value of benefits attributable to class counsel as opposed to the efforts of other groups such as governmental agencies: This factor favors approval because no other groups or governmental agencies have brought parallel actions.

Prudential Factor2 – Percentage of fee that would have been negotiated had the case been subject to a private contingent fee agreement: As Middle District Judge John Jones observed in another wage/overtime class action, contingency fees in this region of the country generally range between 30% and 40%. See Craig, 2013 U.S. Dist. LEXIS 2658, at *47. As such, this factor favors approval of the 23.7% fee recovery sought here.

Prudential Factor3 – Any innovative terms of settlement: While not necessarily "innovative," class counsel wishes to emphasize that the settlement resulted in Defendants' discontinuance of the challenged Expediter tip-out policy. In this regard, the settlement will continue to provide economic benefits to servers and bartenders in the years ahead.

Summary of the Gunter and Prudential Factors: In sum, the Gunter and Prudential factors favor approval of the requested attorney's fee.

3. The lodestar crosscheck favors approval.

While not required, judges awarding fees under the percentage of recovery method may perform a "lodestar crosscheck" in order to ensure that class counsel are not getting too great a windfall for their representation of the class. See Rite Aid, 396 F.3d at 305-07. However, the "cross-check calculation need entail neither mathematical precision nor bean-counting." Id. at 306. Moreover, lodestar multiples ranging from "one to four are frequently awarded in common fund cases when the lodestar method is applied." Prudential, 148 F.3d at 341; Taveras, 2016 U.S. Dist. LEXIS 57689, at *52-55 (2.29 multiplier in wage/overtime class action); Rouse, 2015 U.S. Dist. LEXIS 49347, at *34-35 (2.09 multiplier in wage/overtime class action); Keller v. TD Bank, N.A., 2014 U.S. Dist. LEXIS 155889, *42-43 (E.D. Pa. Nov. 4, 2014) ("multiplier of slightly above 3" in wage/overtime class action)

Here, based on hourly attorney rates utilized by other district courts in performing lodestar cross-checks of class counsel's fees, class counsel's lodestar equals $129,245. See Santillo Dcl. (Ex. 3) at ¶ 22. Thus, the requested $305,688 fee results in a lodestar multiplier of approximately 2.37, which confirms the reasonableness of the requested fee.[10]

G. The requested litigation costs of $31,312 warrant approval.

In addition, class counsel has incurred a total of approximately $31,312 in costs. See Santillo Dcl. (Ex. 3) at ¶ 23; Patton Dcl. (Ex. 2) at ¶ 10. These costs include, among other things, settlement administration fees of $23,350, see Patton Dcl. (Ex. 2) at ¶ 10, mediation fees totaling $5,075, court reporter costs totaling $1,763.76, court fees and service of process costs totaling $500, and printing and postage fees of $505.36, see generally Santillo Dcl. (Ex. 3) at ¶ 23. All of these expenses are reasonable and warrant approval.

V. CONCLUSION

For the above reasons, the Court should approve the settlement and enter the

[10] Of course, fees do not always turn out so well for contingency fee lawyers such as the undersigned. In some cases, they recover nothing for their work. See, e.g., Santillo Dcl. (Ex. 3) at ¶ 3. In other cases, they recover less than their lodestar. See, e.g., Pacheco, 2016 U.S. Dist. LEXIS 16709, at *3 (W&S fee "less than the fee lodestar submitted"); Chung v. Wyndham Vacation Resorts, Inc., 2015 U.S. Dist. LEXIS 77176, *8 (M.D. Pa. June 15, 2015) (W&S fee "significantly lower than the firm's fee lodestar").

accompanying proposed order.

Dated: November 1, 2016

Respectfully,

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